DEVELOPMENT & COMMERCIAL BANK BHD.

v.

PEMBANGUNAN RUMAH PATANI SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C23-388-86]
15 APRIL 1989

CIVIL PROCEDURE: *Appeal against summary judgment - Overdraft facility and guarantee agreement - Whether plaintiff entitled to charge interest as claimed - Whether written notice is vital.*

The defendants' appeal against the decision of the Senior Assistant Registrar ordering them to pay the plaintiff the sum of RM2,369,369.41 together with interest at the rate of 13.75% per annum on monthly rests on the amount within the limit of RM1,915,039 and 18% per annum on monthly rests on the amount exceeding the limit of RM1,915,039 from 27 December 1985 to date of realisation and costs.

The defendants appeal on the ground that the computation of the amount claimed by the plaintiff was wrong and they were not entitled to claim and charge interest at the rate as claimed above.

Held:

[1] It is clear that under the agreement the plaintiff had the right to amend or impose additional terms and conditions provided also that the 1st defendant was given a written notice of such amendments. In the present case, there were no evidence that the plaintiff had given any notice to the 1st defendant.

[2] The agreement did not state that the plaintiff could charge interest on monthly rests. The question raised a triable issue.

[Appeal allowed with costs.]

Case referred to:

Lynde v. Waithman [1895] 2 QB 180

For the plaintiff - Mohd Radzi Abdul Hamid; M/s. Manjit Singh Sachdev, Mohammad Radzi & Partners

For the defendants - Charles Rajah; M/s. Charles Rajah & Co.

JUDGMENT

Zakaria Yatim J:

This was an appeal by the first, second and third defendants against the decision of the Senior Assistant Registrar given on 19 January 1988 ordering that the three defendants paid the plaintiff the sum of RM2,369,369.41 together with interest at the rate of 13.75% per annum on monthly rests on the amount within the limit of RM1,915,039 and 18% per annum on monthly rests on the amount exceeding the limit of RM1,915,039 from 27 December 1985 to date of realisation and costs.

The plaintiff is a bank having its place of business at No. 18, Jalan Selang, Kuala Lumpur. The first defendant is a private limited company incorporated in Malaysia and having its registered office at 1959-P, Jalan Stadium, Alor Star and was at all material times a customer

of the plaintiff. At the request of the defendants the plaintiff granted overdraft facility to the first defendant. The second and third defendant were guarantors to the said facility by virtue of a letter of guarantee executed by them on 22 February 1983.

The plaintiff's claim against the defendants was for a sum of RM2,369,369.41, which was the outstanding sum due from the first defendant to the plaintiff as at 26 December 1985. The plaintiff also claimed against the defendants interest at the rate of 13.75% per annum on monthly rests on the amount within the sanctioned limit of RM1,915,039 and 18% per annum on monthly rests on the amount exceeding the sanctioned limit of RM1,915,039 from 27 December 1985 to date of realisation.

At the hearing of the appeal, Mr. C. Rajah, Counsel for the defendants, submitted that the computation of the amount claimed was wrong and the said amount was not calculated according to contractually agreed upon terms. In their statement of defence, the defendants averred that the plaintiff was not entitled to charge and claim interest at the rate of 13.75% per annum on monthly rests on the amount within the limit of RM1,915,039 and 18% per annum on monthly rests on the amount exceeding the limit of RM1,915,039. Mr. Rajah questioned how the plaintiff could increase the rate of interest to 18%. According to him the defendants were not notified of the increase in the rate of interest to 18% per annum. He therefore submitted that the amount claimed was incorrect or in excess of the actual amount the plaintiff was entitled to claim.

Encik Mohd. Radzi, Counsel for the plaintiff submitted that the increase in the rate of interest to 18% was sufficiently explained in an affidavit affirmed by the plaintiff on 7 September 1987. He alleged that the defendants' argument was not *bona fide*. I have read the plaintiff's affidavit and in para. 4 of the affidavit, the plaintiff merely stated that it was entitled to impose the rate of interest of 18% per annum on monthly rests in accordance with normal banking practice prevailing at the material time. The plaintiff, however did not exhibit any document to show what was the normal banking practice at the material time. The question of whether there was such normal banking practice at the material time was a matter which should be decided at the trial.

In order to consider the issue raised by Mr. Rajah, it was necessary to examine the relevant documents. The agreement for the overdraft facility was contained in a letter of offer dated 17 February 1983 from the plaintiff to the defendant. The terms and conditions stated in the letter of offer were accepted by the first defendant on 18 February 1983. According to the agreement, interest rate was at "14.5% p.a. until further notice." The agreement also stated that the plaintiff "reserve the right to amend or impose additional terms and conditions which (the plaintiff) deem necessary with written notice to you (the first defendant)."

It is clear that under the agreement, the plaintiff was entitled to charge or increase the rate of interest provided that the plaintiff gave notice to the first defendant of the change or increase in the rate of interest. Similarly, the plaintiff had the right to amend or impose additional terms and conditions provided also that the first defendant was given a written notice of such amendment. There was no evidence that the plaintiff had given any notice to the first defendant of the change of the rate of interest from 14.5% per annum to 13.75% per annum on monthly rests within the limit of RM1,915,039 and to 18% per annum on monthly rest on the amount exceeding the limit of RM1,915,039 Mr. Rajah had rightly submitted that no such notice was given to the first defendant. The increase in the rate of interest to 18% raised a triable issue. Furthermore, the agreement did not state that the plaintiff could charge interest on **monthly rests.** The question whether the plaintiff could charge interest on monthly rests also raised a triable issue.

There was clearly a plausible dispute as to the amount which the plaintiff was entitled to recover. In the face of such a dispute it was not proper to allow summary judgment to be signed in favour of the plaintiff. See *Lynde v. Waithman* [1895] 2 QB 180 @ 185.

The second and third defendants as guarantors could not be held liable to pay the sum claimed by the plaintiff in view of what I have just stated.

For the reasons stated above, I allowed the appeal with costs. The defendants were given two weeks to file their defence.

Also found at [1989] 2 CLJ 823